No. 17-1104

In The Supreme Court of the United States

AIR AND LIQUID SYSTEMS CORP.,
CBS CORPORATION, AND FOSTER WHEELER LLC,

Petitioners,

v.

ROBERTA G. DEVRIES, Administratrix of the Estate of John B. DeVries, Deceased, and Widow in her own right,

Respondent.

INGERSOLL RAND COMPANY,

Petitioner,

v.

SHIRLEY MCAFEE, Executrix of the Estate of Kenneth McAfee, and Widow in her own right,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to improvement and reform of the law in the United States and elsewhere, particularly that governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries throughout the manufacturing sector. In addition, several hundred leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law affecting product risk management.

PLAC's members have a strong interest in maintaining traditional tort elements, such as product identification and causation, that confine product liability

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[1] No party or counsel for a party authored any part of this brief, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.2(a), counsel for *amicus curiae* notified counsel of record for all parties of its intent to file this brief, and all parties have consented to the filing of this brief.

[2] *See* https://plac.com/PLAC/AboutPLACAmicus.

within reasonable limits. Fundamental to any rational system of product liability is that defendants may not be liable, under negligence or strict liability, for the purported "defects" – including failure to warn – of products they did not manufacture, market, or otherwise place into the stream of commerce. Product liability has always been justified on the ground that the cost of product injuries should be borne by those who profited from the products' sale.

This *amicus curiae* brief is respectfully submitted to the Court to address the public importance of these issues apart from and beyond the immediate interests of the parties to this case.

SUMMARY OF ARGUMENT

In establishing what amounts to the federal common law of admiralty, this Court looks to the common-law experience of the fifty states that has addressed the same, or similar, legal issues. In this case, the vast majority of states adhere to the fundamental policy that motivated the creation of product liability in the first place – that manufacturers and sellers profiting from product marketing should also assume responsibility for harm caused by the products they sell.

After nearly half a century, asbestos litigation has bankrupted nearly all of the solvent potential defendants against which product liability could rationally

apply.[3] As exemplified by this case, asbestos plaintiffs have not been constrained by traditional legal theories in their pursuit of additional deep pockets. They have sued petitioners despite undisputed facts proving that their products could not possibly have exposed respondents here to asbestos.

Instead, the legal theory this Court is being asked to adopt is that manufacturers of one product are liable to warn about the risks of *other* products made by *other*, unrelated persons. The Court of Appeals held that foreseeability alone, based on product function or anticipated post-sale use by a sophisticated buyer, suffices to impose on the maker of a non-injurious product an obligation to warn about the risks of other possibly injurious ones.

For decades, state common law has wisely refused to extend warning duties to risks of products that a defendant did not make or sell. Such a duty would distort liability and leave manufacturers and sellers responsible for products from which they did not profit and over which they could exercise no control.

Common-law courts also reject legal theories that are thinly disguised excuses for imposition of absolute liability. As a practical matter, the "duty" respondents advocate is impossible to perform. The purported duty would run to unknown persons encountering the product years later regardless of any defendant's ability to

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[3] Between 1982 and 2018, 121 asbestos defendants declared bankruptcy. *See* https://www.crowell.com/files/List-of-Asbestos-Bankruptcy-Cases-Chronological-Order.pdf.

transmit warnings effectively. It would run forever, to persons claiming exposure decades after the defendant parted with the product. It would run notwithstanding the independent action (or inaction) of a sophisticated third-party owner.

Nationwide, the common law overwhelmingly rejects the sort of irrational, counterproductive, and excessive product liability being asserted here. The common law's conclusion is a strong reason for this Court to do likewise.

ARGUMENT

The question before the Court – whether products-liability cases sounding in maritime law should permit liability where defendants never made, sold, or distributed the allegedly injurious product – necessitates examination of analogous common-law principles. Maritime jurisdiction provides for "remedies available at common law." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 454 (2001). Thus, this Court has "translated into maritime law" "clearly authorized [] common-law principles." *Am. Exp. Lines, Inc. v. Alvez*, 446 U.S. 274, 285 (1980). In particular, this Court has "recogniz[ed] products liability, including strict liability, as part of the general maritime law." *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865 (1986). In this case, the Court

> sitting in admiralty may draw guidance from, *inter alia*, the extensive body of state law

> applying proximate causation requirements and from treatises and other scholarly sources.

Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 839 (1996).

Three interrelated, but distinct, common-law concepts weigh against expansion of maritime product-liability duties here: First is the core policy of product-liability law that risk should be congruent with profit. Second is duty; the common-law's reluctance – grounded in policy – to extend the duty to warn beyond a manufacturer's own products. Finally, feasibility concerns bar imposition of sweeping liability through creation of duties that are impossible as a practical matter to perform. This brief discusses each in turn.[4]

I. Liability Here Would Violate The Foundational Requirement Of Product-Liability Law That The Cost Of Product-Related Injuries Should Be Borne By Those Who Profit From The Sale Of Injurious Products.

In its decision below, the Third Circuit extended asbestos liability to defendants that even respondents concede did not make any asbestos-containing product to which they were exposed. That court proclaimed that "the bare-metal defense is nothing more than the concept of foreseeability." Pet. App. 8a.

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[4] While respondents allege only negligence claims, common-law precedent, as will be seen, applies the same principles to both negligence and strict liability.

This expansion of asbestos liability, however, flies in the face of the most fundamental tenets of product-liability law. "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market." *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963).[5] The American Law Institute's Restatement (Second) of Torts §402A (1965), adopted by dozens of states, expressly identified these "justifications" for modern strict liability:

- "[T]he seller, by marketing his product . . . , has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it."
- "[T]he public has the right to and does expect . . . that reputable sellers will stand behind their goods."
- "[P]ublic policy demands that the burden of accidental injuries caused by products . . . be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained."

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[5] Likewise Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 444 (Cal. 1944), presaging *Greenman*, recognized that a "manufacturer's liability . . . should not extend to injuries that cannot be traced to the product as it reached the market."

- "[T]he proper persons to afford it [protection of consumers] are those who market the products."

Id., comment c.

Similarly, this Court has acknowledged, in the maritime product-liability context, that "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." *East River S.S.*, 476 U.S. at 866. Historically, that policy has always predicated liability on the defendant's role in marketing an allegedly defective product.

These core product-liability principles have been followed by the high courts of practically every state in the nation. The proposition that product manufacturers should be subject to product liability because they control their products' condition, profit from their sale, and can insure against risks, is foundational. Thus, the law of almost every American jurisdiction holds that those in the chain of distribution of a product – and only those entities – may be liable for product-related injuries.

A number of jurisdictions have done so by expressly adopting as their own the "justifications" for product liability from Restatement §402A, comment c as quoted above. **Alabama**: *First Nat'l Bank of Mobile v. Cessna Aircraft Co.*, 365 So.2d 966, 967 (Ala. 1978); **Colorado**: *Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1246 (Colo. 1987); **Connecticut**: *Wagner v. Clark Equip. Co.*, 700 A.2d 38, 52 (Conn. 1997); **District of**

Columbia: *Fisher v. Sibley Mem'l Hosp.*, 403 A.2d 1130, 1134 n.10 (D.C. 1979); **Massachusetts**: *Haglund v. Philip Morris, Inc.*, 847 N.E.2d 315, 322 (Mass. 2006); **Nevada**: *Allison v. Merck & Co.*, 878 P.2d 948, 955 (Nev. 1994); **North Dakota**: *Haugen v. Ford Motor Co.*, 219 N.W.2d 462, 470 (N.D. 1974); **Pennsylvania**: *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 383 (Pa. 2014); **South Carolina**: *Schall v. Sturm, Ruger Co.*, 300 S.E.2d 735, 736 (S.C. 1983); **South Dakota**: *Zacher v. Budd Co.*, 396 N.W.2d 122, 143 (S.D. 1986); **Vermont**: *Webb v. Navistar Int'l Transp. Corp.*, 692 A.2d 343, 346 (Vt. 1996).

Other state high courts have independently expressed similar reasons for linking product liability to product manufacture, marketing, and sale. The **California** Supreme Court reiterated in *Brown v. Superior Court*, 751 P.2d 470, 478 (Cal. 1988), that the "fundamental reasons" for product liability "are to deter manufacturers from marketing products that are unsafe, and to spread the cost of injury . . . to the consuming public . . . to reflect the increased expense of insurance to the manufacturer"; *see Daly v. Gen. Motors Corp.*, 575 P.2d 1162, 1170 (Cal. 1978) ("the basis for [a defendant's] liability remains that he has marketed or distributed a defective product"). *See also*:

Alaska: *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 53 (Alaska 2001) ("The purpose of the modern strict liability regime is to insure that the cost of injuries resulting from defective products is borne by the manufacturers that put such products on the market.") (footnote and quotation marks omitted).

Arizona: *Torres v. Goodyear Tire & Rubber Co.*, 786 P.2d 939, 944 (Ariz. 1990) ("strict liability was intended to place the loss caused by defective products on those who create the risk and reap the profit") (citation and quotation marks omitted).

Delaware: *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581, 587 (Del. 1976) ("the cost of compensating for injuries and damages arising from the use of a defective [product] should be borne by the party who placed it in circulation").

Florida: *Aubin v. Union Carbide Corp.*, 177 So.3d 489, 503 (Fla. 2015) ("The cost of injuries or damages . . . resulting from defective products, should be borne by the makers of the products who put them into the channels of trade.") (quoting *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 92 (Fla. 1976)).

Georgia: *Robert F. Bullock, Inc. v. Thorpe*, 353 S.E.2d 340, 341 (Ga. 1987) ("the doctrine of strict liability puts a burden on the manufacturer . . . to take responsibility for injury to members of the consuming public for whose use and/or consumption the product is made").

Idaho: *Vannoy v. Uniroyal Tire Co.*, 726 P.2d 648, 653 (Idaho 1985) ("the policy underlying strict products liability [is] the spreading of loss to manufacturers who are best able to absorb it").

Indiana: *Reed v. Cent. Soya Co.*, 621 N.E.2d 1069, 1072 (Ind. 1993) ("public policy demands that the burden of accidents be placed upon those who market

products and who can treat that burden as a cost of doing business").

Kansas: *McKernan v. Gen. Motors Corp.*, 3 P.3d 1261, 1267 (Kan. 2000) (following "the public policy of fixing responsibility for defective products on the party who introduces the product to the market place").

Maine: *Austin v. Raybestos-Manhattan, Inc.*, 471 A.2d 280, 288 (Me. 1984) ("The seller becomes subject to liability if an unreasonably dangerous product causes injury.").

Maryland: *Phipps v. Gen. Motors Corp.*, 363 A.2d 955, 958 (Md. 1976) (product liability "advances the policy of requiring those who make and sell defective products to bear the costs of the injuries that result therefrom").[6]

Michigan: *Langley v. Harris Corp.*, 321 N.W.2d 662, 665 (Mich. 1982) ("the public policy implicit in products liability law [is] that the manufacturer is best able to provide for the risk of defective products").

Minnesota: *Lee v. Crookston Coca-Cola Bottling Co.*, 188 N.W.2d 426, 431 (Minn. 1971) (invoking the "policy consideration[ ]" that "the burden of loss caused

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[6] In *May v. Air & Liquid Sys. Corp.*, 129 A.3d 984, 994, 999-1000 (Md. 2015), however, the court discounted "crushing transaction costs" and ignored precedent to carve out an asbestos-specific exception to the general rule that product-liability defendants are not liable for harm caused by third-party products. The dissent, relying on *Phipps*, correctly concluded that "this holding has no support whatsoever in Maryland case law." *Id.* at 1010 (Watts & Battaglia, JJ., dissenting).

by placing a defective product on the market should be borne by the manufacturer, who is best able to distribute it by insuring against inevitable hazards as a part of the cost of the product").

Montana: *Sternhagen v. Dow Co.*, 935 P.2d 1139, 1143 (Mont. 1997) ("'requiring the manufacturer to bear the burden of injuries and losses enhanced by such defects in its products'") (quoting *Brandenburger v. Toyota Motor Sales, U.S.A., Inc.*, 513 P.2d 268, 275 (Mont. 1973)).

Nebraska: *Jones v. Johnson Mach. & Press Co.*, 320 N.W.2d 481, 484 (Neb. 1982) ("public policy considerations which motivate imposition of strict liability on those who create risk and obtain profit by placing defective products in the stream of commerce").

New Hampshire: *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288, 293 (N.H. 1983) ("the risk of liability is best borne by the companies that profited from their sale").

New Jersey: *Mettinger v. Globe Slicing Mach. Co.*, 709 A.2d 779, 783 (N.J. 1998) ("The underlying public policy is that those engaged in the producing and marketing enterprise should bear the cost of marketing defective products.").

New Mexico: *Livingston v. Begay*, 652 P.2d 734, 738 (N.M. 1982) ("an important reason for imposing strict liability was to encourage manufacturers to take care in production activities").

Oklahoma: *Tansy v. Dacomed Corp.*, 890 P.2d 881, 884 (Okla. 1994) ("The manufacturer is in a position of control over the manufacture and testing of the product.").

Oregon: *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1041 (Or. 1974) ("one of the principal rationales behind the imposition of strict liability . . . is that the manufacturer is in the position of distributing the cost of such risks among all users of the product").

Rhode Island: *Clift v. Vose Hardware, Inc.*, 848 A.2d 1130, 1132 (R.I. 2004) ("[i]t is axiomatic that a plaintiff must prove that the proximate cause of his or her injuries was the defendant's product").

Tennessee: *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 693 (Tenn. 1995) (a "principal reason[ ]" for product liability is "to encourage greater care in the manufacture of products that are distributed to the public").

Utah: *Bylsma v. R.C. Willey*, 416 P.3d 595, 606 (Utah 2017) ("we ensure that the costs of injuries resulting from defective products are borne by the [sellers] that put such products on the market") (citation and quotation marks omitted).

Washington: *Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069, 1072 (Wash. 2012) ("a manufacturer does not have a duty to warn of the dangers inherent in a product that it does not manufacture, sell, or supply").

Wisconsin: *Haase v. Badger Mining Corp.*, 682 N.W.2d 389, 396 (Wis. 2004) ("the seller is in the paramount position to distribute the costs of the risks created by the defective product he is selling"; "the manufacturer has the greatest ability to control the risk created by his product") (citations and quotation marks omitted).

Wyoming: *Schneider Nat'l, Inc. v. Holland Hitch Co.*, 843 P.2d 561, 582 (Wyo. 1992) ("strict liability . . . reflects a sound public policy consideration that the manufacturer who places a product in the stream of commerce . . . is best able to bear the risk of loss") (citation and quotation marks omitted).

Applying these fundamental product-liability principles, numerous courts have specifically invoked them as grounds for *rejecting* attempts to extend liability to defendants that, as here, are entirely outside the chain of distribution of the products that allegedly injured the plaintiffs.

Starting with asbestos litigation, the plaintiffs' "endless search for a solvent bystander"[7] has resulted in repeated assertion of the sort of liability claims at issue here. Petitioners are not alleged to have manufactured any products that actually exposed respondents to asbestos. In precisely these situations, most

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[7] *See* Richard Scruggs & Victor Schwartz, *Medical Monitoring and Asbestos Litigation – A Discussion with Richard Scruggs and Victor Schwartz*, 1-7:21 Mealey's Asbestos Bankr. Rep. 5 (Feb. 2002) (quoting plaintiffs' attorney Scruggs describing the asbestos litigation in these terms).

courts have likewise invoked fundamental product-liability principles to reject expansive liability for products defendants did not make.

Most directly relevant is *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488, 495-97 (6th Cir. 2005), which rejected such liability, as here, under maritime law. Both negligence and strict liability require that "a plaintiff must establish causation." *Id.* at 492. Causation, in turn requires proof, *inter alia*, that the defendant was actually "exposed to the defendant's product." *Id.* A defendant "cannot be held responsible for material 'attached or connected' to its product" where the plaintiff "almost certainly could not have handled the original" material, so that any asbestos exposure "would be attributable to some other manufacturer." *Id.* at 495.

In *O'Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012), **California** law tracked the "bedrock principle" of product liability "requir[ing] that 'the plaintiff's injury must have been caused by a "defect" in the [defendant's] product.'" *Id.* at 994-95. Thus:

> [T]he reach of strict liability is not limitless. We have never held that strict liability extends to harm from entirely distinct products that the consumer can be expected to use with, or in, the defendant's nondefective product. Instead, we have consistently . . . requir[ed] proof that the plaintiff suffered injury caused by a defect in the defendant's own product.

Id. at 995. "The same policy considerations that militate against imposing strict liability in this situation

apply with equal force in the context of negligence." *Id.* at 1007.

Similarly, in *Simonetta v. Viad Corp.*, 197 P.3d 127, 131-38 (Wash. 2008), and *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 497-504 (Wash. 2008), **Washington's** highest court rejected expansion of asbestos liability to non-asbestos containing products. The court concluded, under both negligence and strict liability, that product liability should be "limited to those in the chain of distribution of the hazardous product." *Simonetta*, 197 P.3d at 134; *see also Braaten*, 198 P.3d at 504. Fundamental tort principles were at stake:

> We justify imposing liability on the defendant who, by manufacturing, selling, or marketing a product, is in the best position to know of the dangerous aspects of the product and to translate that knowledge into a cost of production against which liability insurance can be obtained. Here, [defendant] did not manufacture or market the asbestos insulation. Nor did [defendant] have control over the [product] . . . selected. Thus, as the following analysis of these factors establishes, [defendant] is not strictly liable for failure to warn.

Simonetta, 197 P.3d at 134; *accord Braaten*, 198 P.3d at 504.[8]

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[8] *See also Hughes v. A.W. Chesterton Co.*, 89 A.3d 179, 190 (N.J. Super. App. Div. 2014); *Gillenwater v. Honeywell Int'l, Inc.*, 996 N.E.2d 1179, 1200 (Ill. App. 2013).

For similar reasons, the **Oklahoma** Supreme Court refused to impose another, albeit less radical[9] form of non-manufacturer liability – market share liability – in asbestos litigation:

> [P]ublic policy favoring recovery on the part of an innocent plaintiff does not justify the abrogation of the rights of a potential defendant to have a causative link proven . . . where there is a lack of circumstances which would insure that there was a significant probability that those acts were related to the injury.

Case v. Fibreboard Corp., 743 P.2d 1062, 1067 (Okla. 1987). "The creation of a program of compensation for victims of asbestos related injuries . . . is a matter for the legislative body and not for the courts." *Id.*

Likewise, **Texas** rejected market share liability as a means of holding non-manufacturers liable in asbestos cases. "A fundamental principle of traditional products liability law is that the plaintiff must prove that the defendants supplied the product which caused the injury." *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989). *See Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 340 (Tex. 2014) (reaffirming *Gaulding*). As *Case* and *Gaulding* exemplify, market share liability as

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[9] Market share liability is less radical than the theory being advanced here. For one thing, under a market share theory, liability would only be partial, limited to a defendant's market share, not the 100% recovery respondents seek. Also unlike market share liability in *Case*, where exposure or lack of exposure to defendant's product simply could not be determined, here it is undisputed that neither of respondents' decedents was exposed to any asbestos-containing product made by any petitioner.

a theory for holding *non*-manufacturers liable for other persons' products has also been widely rejected in asbestos litigation.[10]

Numerous other states have likewise rejected attempts to impose non-manufacturer product liability in various circumstances. Most recently, in **West Virginia**, the state's highest court rejected the imposition of warning-based liability on manufacturers of branded prescription drugs for injuries concededly caused by their generic competitors. "[P]roducts liability law is abundantly clear [that] liability is premised upon the defendant being the manufacturer or seller of the product in question," thus, "it is essential in a products liability action . . . for the plaintiff to identify the defendant as either the manufacturer or seller of the

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[10] *Black v. Abex Corp.*, 603 N.W.2d 182, 189 (N.D. 1999); *Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691, 702 (Ohio 1987); *Celotex Corp. v. Copeland*, 471 So.2d 533, 536-39 (Fla. 1985); *Reiter v. AC&S, Inc.*, 947 A.2d 570, 573 (Md. App. 2008), *aff'd*, 8 A.3d 725 (Md. 2010); *Leng v. Celotex Corp.*, 554 N.E.2d 468, 470-71 (Ill. App. 1990); *Mullen v. Armstrong World Indus., Inc.*, 246 Cal. Rptr. 32, 35-37 (App. 1988); *Jackson v. Anchor Packing Co.*, 994 F.2d 1295, 1303 (8th Cir. 1993) (applying Arkansas law); *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 379-81 (3d Cir. 1990) (applying Pennsylvania law); *White v. Celotex Corp.*, 907 F.2d 104, 105 (9th Cir. 1990) (applying Arizona law); *Menne v. Celotex Corp.*, 861 F.2d 1453, 1468 n.22 (10th Cir. 1988) (applying Nebraska law); *Bateman v. Johns-Manville Sales Corp.*, 781 F.2d 1132, 1133-34 (5th Cir. 1986) (applying Louisiana law); *Blackston v. Shook & Fletcher Insul. Co.*, 764 F.2d 1480, 1483 (11th Cir. 1985) (applying Georgia law); *Nutt v. A.C. & S. Co.*, 517 A.2d 690, 694 (Del. Super. 1986); *Pace v. Air & Liquid Sys. Corp.*, 171 F. Supp.3d 254, 263 n.10 (S.D.N.Y. 2016); *Univ. Sys. of N.H. v. U.S. Gypsum Co.*, 756 F. Supp. 640, 655-56 (D.N.H. 1991); *Marshall v. Celotex Corp.*, 651 F. Supp. 389, 392-94 (E.D. Mich. 1987).

product complained of." *McNair v. Johnson & Johnson*, ___ S.E.2d ___, 2018 WL 2186550, at *5 (W. Va. May 11, 2018) (citation and quotation marks omitted). *See also*:

Hawaii: *Leong v. Sears Roebuck & Co.*, 970 P.2d 972, 979 (Haw. 1998) ("Because [defendant] did not manufacture or commercially distribute [the product] . . . none of the public policy rationales justifying the doctrine of strict products liability would be served by" imposing liability).

Illinois: *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 342-43 (Ill. 1990) ("there may not be an incentive to produce safer products if liability could still be imposed as a result of the negligence of others in the industry and if the manufacturer knows that others in the industry will absorb the damages resulting from its negligence").

Iowa: *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 376 (Iowa 2014) ("to expand tort liability to those who did not make or supply the injury-causing product used by the plaintiff involves policy choices and 'social engineering more appropriately within the legislative domain'") (quoting *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986)).

Missouri: *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 247 (Mo. 1984) (finding "insufficient justification . . . to support abandonment of so fundamental a concept of tort law as the requirement that a plaintiff prove, at a minimum, some nexus between wrongdoing and injury").

Ohio: *Sutowski v. Eli Lilly & Co.*, 696 N.E.2d 187, 191 (Ohio 1998) ("imposition of liability upon a manufacturer for harm that it may not have caused is the very legal legerdemain, at least by our long held traditional standards, that we believe the courts should avoid").

Oregon: *Senn v. Merrell-Dow Pharm., Inc.*, 751 P.2d 215, 223 (Or. 1988) ("adoption of any theory of alternative liability" in a product-liability case would "require[ ] a profound change in fundamental tort principles").

Pennsylvania: *Skipworth v. Lead Indus. Ass'n, Inc.*, 690 A.2d 169, 172 (Pa. 1997) ("Pennsylvania . . . follows the general rule that a plaintiff . . . must establish that a particular defendant's negligence was the proximate cause of her injuries"; "[a]pplication of market share liability . . . would lead to a distortion of liability which would be so gross as to make determinations of culpability arbitrary and unfair.").

Virginia: *Baker v. Poolservice Co.*, 636 S.E.2d 360, 365 (Va. 2006) (product liability "has no application [where defendant] was not the manufacturer of the [product] or any of its component parts").

Finally, in **New York**, the highest court had consistently refused to extend market share liability beyond the single situation where it had been legislatively encouraged, expressing "judicial resistance to the expansion of duty" and expressing "practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another."

Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1061 (N.Y. 2001). Similarly, in *Rastelli v. Goodyear Tire & Rubber Co.*, design-related liability for a product used in conjunction with the defendant's could not exist where the defendant "did not contribute to the alleged defect in a product, had no control over it, and did not produce it." 591 N.E.2d 222, 226 (N.Y. 1992).[11]

Reinforcing the common law, many states have enacted statutes explicitly defining "product liability" actions so that liability is confined to those who manufactured, distributed or were otherwise involved with the product that actually caused injury. Ariz. Rev. Stat. §12-681(5); Ark. Code §16-116-101; Colo. Rev. Stat. §13-21-401(2); Conn. Gen. Stat. §52-572n(a); Ga. Code §51-1-11(d-e); Idaho Code §6-1402(1); Ind. Code §34-20-1-1; Kan. Stat. §60-3302(a-c); La. Stat. §9:2800.52; Me. Rev. Stat. tit. 14, §221; Miss. Code §11-1-63; N.J. Stat. §2A:58C-2; N.C. Gen. Stat. §99B-1; N.D. Cent. Code §28-01.3-01; Ohio Rev. Code §2307.71(13); Or.

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[11] Subsequently, in a case similar to that before the Court, the New York Court of Appeals departed from *Rastelli* in asbestos litigation and refused to "rel[y] . . . on the fact that a manufacturer has no control over the third-party product and in fairness cannot be expected to inspect" other manufacturers' products. *In re New York City Asbestos Litig.*, 59 N.E.3d 458, 477-78 (N.Y. 2016). Instead, that court opted for a burdensome and unpredictable case-by-case evaluation of the "design, mechanics or economic necessity" of products that never contained any asbestos to which a plaintiff was exposed. *Id.* at 474. That court's blithe assurance that such liability would "not impose[ ] extreme or unreasonable financial liability on manufacturers," *id.* at 473, is belied by decades of real-world experience with asbestos litigation, which has bankrupted over 120 defendants. *See supra* note 3.

Rev. Stat. §30.900; S.C. Code §15-73-10 (codifying Restatement §402A); Tenn. Code §29-28-105(a); Tex. Civ. Prac. & Rem. Code §82.001(2); Utah Code §78B-6-703(1); Wash. Rev. Code §7.72.030(1); Wis. Stat. §895.046(3).

In sum, across the nation, fundamental and almost universally recognized product-liability principles require that, for liability to attach, the defendant must have: (1) control over the product so that it could improve product safety, and (2) profited from the sale of the product so that it would be fair to treat product-related injuries as a cost of doing business. This is so both outside and within asbestos litigation. The cases before the Court fulfill neither of these prerequisites.

II. Product Manufacturers Have No Duty To Warn About Risks Of Products They Do Not Make.

As a specific application of the common law's limiting product liability to those who profit from sale of injurious products, a product manufacturer's duty to warn of product risks does not extend to include the risks of products it did not make. Richard E. Kaye, American Law of Products Liability 3d §32:9 (May 2018 Supp.). "Although a product manufacturer generally has a duty to warn of the dangers of its own products, it does not have a duty to warn of the danger of another manufacturer's products." *Barnes v. Kerr Corp.*, 418 F.3d 583, 590 (6th Cir. 2005) (applying Tennessee law).

Even where – unlike asbestos – the defendant has made an identical product, the vast majority of courts have resisted expanding the duty to warn to reach those other, competing products. In *Huck v. Wyeth*, the Iowa Supreme Court cautioned:

> It may well be foreseeable that competitors will mimic a product design or label. But, we decline [plaintiff's] invitation to step onto the slippery slope of imposing . . . liability on manufacturers for harm caused by a competitor's product. Where would such liability stop?

850 N.W.2d at 380 (citation omitted). Similarly, in *In re Darvocet, Darvon, & Propoxyphene Prods. Liab. Litig.*, 756 F.3d 917 (6th Cir. 2014), the court examined the laws of 22 states and concluded that none would hold a manufacturer of a branded prescription drug responsible for warning defects in bioequivalent generic products. First, "it is well-settled law" that the "'threshold requirement of any products-liability claim is that the plaintiff assert that the defendant's product caused the plaintiff's injury.'" *Id.* at 938. Second, non-manufacturing defendants "do not owe users of generic drugs a duty that can give rise to liability." *Id.* Combining both reasons:

> An overwhelming majority of courts . . . have rejected the contention that a name brand manufacturer's statements regarding its drug

> can serve as the basis for liability for injuries caused by another manufacturer's drug.

Id. (citations and footnote omitted).[12]

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[12] *Darvocet* examined and applied the laws of Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Nebraska, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Washington, and West Virginia. *Id.* at 941-54. Other appellate decisions rejecting imposition of so-called "innovator liability" on branded drug manufacturers for injuries caused by allegedly inadequately labeled generic drugs are: *McNair*, *supra*; *Johnson v. Teva Pharmaceuticals USA, Inc.*, 758 F.3d 605, 614-15 (5th Cir. 2014) (applying Louisiana law); *Eckhardt v. Qualitest Pharmaceuticals, Inc.*, 751 F.3d 674, 681 (5th Cir. 2014) (applying Texas law); *Lashley v. Pfizer, Inc.*, 750 F.3d 470, 476-78 (5th Cir. 2014) (applying Mississippi & Texas law); *Strayhorn v. Wyeth Pharmaceuticals*, 737 F.3d 378, 403-05 (6th Cir. 2013) (applying Tennessee law); *Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1284 (10th Cir. 2013) (applying Oklahoma law); *Fullington v. PLIVA, Inc.*, 720 F.3d 739, 744 (8th Cir. 2013) (applying Arkansas law); *Guarino v. Wyeth*, 719 F.3d 1245, 1251-53 (11th Cir. 2013) (applying Florida law); *Bell v. Pfizer, Inc.*, 716 F.3d 1087, 1092-93 (8th Cir. 2013) (applying Arkansas law); *Smith v. Wyeth, Inc.*, 657 F.3d 420, 423-24 (6th Cir. 2011) (applying Kentucky law); *Foster v. American Home Products Corp.*, 29 F.3d 165, 168-71 (4th Cir. 1994) (applying Maryland law); *Moretti v. Wyeth, Inc.*, 579 F.App'x 563, 564-65 (9th Cir. 2014) (applying Nevada law); *PLIVA, Inc. v. Dement*, 780 S.E.2d 735, 743 (Ga. App. 2015); *Franzman v. Wyeth, Inc.*, 451 S.W.3d 676, 689-92 (Mo. App. 2014) (applying Kentucky law); *Stanley v. Wyeth, Inc.*, 991 So.2d 31, 34-35 (La. App. 2008); *Flynn v. American Home Products Corp.*, 627 N.W.2d 342, 350 (Minn. App. 2001).

Only California recognizes such a theory, but this result-oriented deviation has not been extended to any other context. *See T.H. v. Novartis Pharm. Corp.*, 407 P.3d 18, 31 n.2 (Cal. 2017) (absence of federal preemption would prompt "reconsideration of the brand-name manufacturer's duty in this category of cases"). Massachusetts requires intentional conduct to expand the duty to warn in this fashion. *Rafferty v. Merck & Co.*, 92 N.E.3d 1205, 1220

However, the law's refusal to impose duties to warn about the risks of other entities' products long precedes the recent controversy about innovator drug liability. "A manufacturer generally does not have a duty to warn or instruct about another manufacturer's products, even though a third party might use those products in connection with the manufacturer's own product." *Firestone Steel Prod. Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996).

> [I]t is clear the manufacturer's duty is restricted to warnings based on the characteristics of *the manufacturer's own product*. Understandably, the law does not require a manufacturer to study and analyze the products of others and to warn users of risks of those products.

Powell v. Standard Brands Paint Co., 212 Cal. Rptr. 395, 398 (App. 1985) (citations omitted).

For example, it is black letter law that the manufacturer of a non-defective component part has no duty to warn about other components that it did not make, unless it "substantially participates in the integration of the component into the design of the [overall] product." Restatement (Third) of Torts, Products Liability §5(b)(1) (1998). The duty to warn "has no application . . . because [defendant] was not the manufacturer of the [product] or any of its component parts." *Baker*, 636 S.E.2d at 365. "[A] distributor or manufacturer of a

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(Mass. 2018). In Alabama, a decision allowing innovator liability was promptly overturned by statute. Ala. Code §6-5-530(a).

nondefective component is not liable for defects in a product that it did not manufacture, sell, or otherwise place in the stream of commerce." *Sanders v. Ingram Equip., Inc.*, 531 So.2d 879, 880 (Ala. 1988). "We have never held a manufacturer liable, however, for failure to warn of risks created solely in the use or misuse of the product of another manufacturer." *Mitchell v. Sky Climber, Inc.*, 487 N.E.2d 1374, 1376 (Mass. 1986).

There is no "rationale for imposing liability" where "the defendant manufacturer did not incorporate the defective component part into its finished product and did not place the defective component into the stream of commerce." *Baughman v. Gen. Motors Corp.*, 780 F.2d 1131, 1132-33 (4th Cir. 1986) (applying South Carolina law).

> [Plaintiff's] position would require a manufacturer to test all possible replacement parts made by any manufacturer to determine their safety and to warn against the use of certain replacement parts. If the law were to impose such a duty, the burden upon a manufacturer would be excessive.

Id. at 1133.

In *Rastelli, supra*, the court "decline[d] to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product." 591 N.E.2d at 225-26. Merely because two products could be used together did not create any duty to warn about the risks of compatible products. *Accord Acoba v. Gen. Tire, Inc.*, 986

P.2d 288, 304-05 (Haw. 1999) ("a manufacturer owes a duty to warn regarding its *own product*, not regarding products it did not produce, sell, or control") (following *Rastelli*).

Nor is judicial reluctance to require warnings about other entities' products limited to component parts. In *Johnson v. Jones-Blair Paint Co.*, 607 S.W.2d 305 (Tex. App. 1980), the court held that a paint manufacturer had no duty to warn about the flammable nature of other products typically used to clean up spilled paint, even though paint spatters are an inevitable part of painting.

> [T]he product (paint) is not unreasonably dangerous in the absence of the warning urged by plaintiffs. The dried paint spots did not explode. The explosion resulted from the use of a product (gasoline) supplied by a seller other than [defendant].

Id. at 306. "[M]anufacturers d[o] not have a duty to provide warnings for dangerous conditions present in other products." *Brown v. Drake-Willock Int'l, Ltd.*, 530 N.W.2d 510, 515 (Mich. App. 1995) ("recommend[ing]" a cleaning method created no duty to warn about it, since "the manufacturers . . . had no duty to warn about others' products").

Analogously, a scaffolding manufacturer that did not supply wood planks used to floor the scaffold had no duty to warn about the wood. "Foreseeability" that wood planks would be used did not create a duty. "[W]e emphasize [defendant] did not supply the 'defective'

product." "Pennsylvania law does not permit" liability for not "warn[ing] of dangers inherent in [a product] that it did not supply." *Toth v. Econ. Forms Corp.*, 571 A.2d 420, 422-23 (Pa. Super. 1990). The same is true of a strap used to fasten a load. *Walton v. Harnischfeger*, 796 S.W.2d 225, 226 (Tex. App. 1990) ("a manufacturer does *not* have a duty to warn or instruct about another manufacturer's products, even though those products might be used in connection with the manufacturer's own product").

In a successor liability situation, the court in *Fricke v. Owens-Corning Fiberglas Corp.*, was "not prepared to hold a manufacturer responsible for alleged inadequate warnings about a product it neither manufactured nor sold" where the defendant sold the company and the successor used the same allegedly defective warning on its own products. 618 So.2d 473, 475 (La. App. 1993). *Accord McConkey v. McGhan Med. Corp.*, 144 F. Supp.2d 958, 964 (E.D. Tenn. 2000) ("Plaintiffs cannot establish that [prior owner] owed a duty to the customers of [corporate successor] to warn about dangers of [products] it did not produce.").

In *Yates v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 808 F.3d 281 (6th Cir. 2015) (applying New York law), no duty existed to warn about the allegedly lower risks of competing drugs. Warning duties existed only about a product's own risks, "not to different drugs treating the same ailment." *Id.* at 291-92. Earlier, *Pluto v. Searle Laboratories*, 690 N.E.2d 619 (Ill. App. 1997), rejected the same argument, finding no duty to warn about the comparative risks of "competing products":

> [Defendant] is under no duty to provide information on other products in the marketplace. Such a duty would require drug manufacturers to rely upon the representations made by competitor drug companies. This arrangement would only lead to greater liability on behalf of drug manufacturers that were required to vouch for the efficacy of a competitor's product. Furthermore, such a duty would raise serious implications regarding the free flow of commerce in that industry.

Id. at 621. *See Batoh v. McNeil-PPC, Inc.*, 167 F. Supp.3d 296, 314 (D. Conn. 2016) ("[defendant] owed no duty . . . to warn [plaintiff's] physician about a product that it did not make or sell"); *Adamson v. Ortho-McNeil Pharm., Inc.*, 463 F. Supp.2d 496, 504 (D.N.J. 2006) ("courts have routinely held that competitors have no duty to advertise or sell a competitor's products").[13]

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[13] For other prescription medical product decisions rejecting warnings concerning other products, *see Johnson v. American Cyanamid Co.*, 718 P.2d 1318, 1326 (Kan. 1986) (rejecting claim that defendant "did not provide information on alternate vaccines"); *Ackley v. Wyeth Laboratories*, 919 F.2d 397, 405 (6th Cir. 1990) (manufacturer "not obligated to provide a comparison of its drug with others") (applying Ohio law); *Kapps v. Biosense Webster, Inc.*, 813 F. Supp.2d 1128, 1158 (D. Minn. 2011) (defendant "does not reprocess its own" devices, therefore no duty to warn of risks of third-party reprocessing); *Doe v. Ortho-Clinical Diagnostics, Inc.*, 335 F. Supp.2d 614, 626-27 (M.D.N.C. 2004) (that defendant "knew that other manufacturers were copying its expired patent" did not create duty to warn); *Smith v. Wyeth Laboratories, Inc.*, 1986 WL 720792, at *10 (S.D.W. Va. Aug. 21, 1986) ("no authority for [plaintiffs'] argument that a drug manufacturer may be required to represent that other drugs with similar effects are safer").

The duty that respondents advocate in these cases is a far cry from "traditionally compensable" warning claims in either strict liability or negligence. *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 148 (2003). The risks alleged here undisputedly arose from contact with products that petitioners never produced and never controlled. Outside of the "elephantine mass of asbestos cases," *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999), defendants are only subject to liability for inadequacies in their warnings about their own products.

Maritime law should not cast aside this causal and policy-laden limitation, and set sail on the endless sea of liability for unwarned-of risks from any product made by anyone that might "foreseeably" be used in conjunction with a defendant's product. Such claims pose "a threat of unlimited and unpredictable liability" of the sort this Court properly rejected in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424, 433 (1997) – not coincidentally, another asbestos case. The Court should likewise reject the expansive claims being asserted here.

III. The Common Law Disfavors Creation Of Tort Duties That Are Impossible To Satisfy.

Another aspect of the novel warning duty allowed by the Court of Appeals is that, as a practical matter, complying with the purported duty is so difficult that successful compliance is essentially impossible.

In *DeVries*, the navy ship incorporating the petitioners' products as original equipment was built in

1945. The non-asbestos-containing equipment at issue was built to the navy's World War II specifications. John DeVries served aboard that ship over ten years later, between 1957 and 1960. Only occasionally, at best, did he actually operate this equipment.

In *McAfee*, Kenneth McAfee served on two navy ships that first went into service in 1958 and 1973. He served in the late 1970s and early 1980s. Without dispute, installation of the relevant products occurred long enough before McAfee's service that the original, navy-specified, asbestos-containing components had all worn out and been replaced many times over before his service began. Petitioners had nothing to do with selecting or obtaining replacement parts for the navy.

In both cases, respondents have no evidence of asbestos exposure from petitioners' products. Unable (or unwilling) to limit themselves to actual sources of asbestos exposure, respondents sued anyone they could identify – in excess of fifty defendants apiece. However, if the "keystone is the concept of foreseeability," Pet. App. 7a, then any manufacturer could have a duty to warn irrespective of what products they made. It need only be "foreseeable" that their products would be used along with other, asbestos-containing products that wear out or otherwise become unidentifiable during the decades between a plaintiff's alleged exposure and when suit is filed.

The warning duty being asserted in this case is thus:

- untethered to the risks of the defendant's own product;
- extends for an unlimited time;
- extends to an ever-changing and unlimited group of persons with no relationship to the defendant;
- would be owed by manufacturers of all products made part of a complex system; and
- would impose liability for products that were specified, installed, and maintained by a sophisticated third-party owner.[14]

Respondents offer no practical way for a defendant to identify, let alone communicate with, the large number of people to whom their novel duty is allegedly owed over an open-ended period of time.

The common law does not adopt impossible duties as a back door to absolute liability. Restatement §402A recognizes that "[m]any products cannot possibly be made entirely safe for all consumption" and "some products [are], in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use." Restatement (Second) of Torts §402A, comments i, k (1965). Such risks are not, by themselves, grounds for liability. *Id.* More generally,

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[14] *Cf. Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-13 (1988) (discussing sophistication of federal procurement agencies in "balancing" risk and effectiveness).

a duty may not impose an "obligation which is not within the actor's ability to perform, since it relates only to the actor's conduct over which as such he has control." Restatement (Second) of Torts §4, comment a (1965).[15] This Court reached essentially the same conclusion in the bankruptcy context, holding that even "reprehensible" conduct cannot warrant "an order which creates a duty impossible of performance, so that punishment can follow." *Maggio v. Zeitz*, 333 U.S. 56, 64 (1948).

Reasons of impracticality have also led most courts in asbestos litigation to refuse to extend the duty to warn to encompass family members and other persons exposed to asbestos fibers from the clothing of asbestos workers, as such persons are unknown to, and unreachable by, the defendants.

> Of course, it would be "simpler" if everyone owed a legal duty of care to all people at all times. . . . But "[l]ife will have to be made over, and human nature transformed" before such a duty could "be accepted as the norm of conduct, the customary standard to which behavior must conform." Such a limitless duty framework is impractical, unmanageable, and has never been the law in this state.

Quiroz v. ALCOA Inc., 416 P.3d 824, 843 (Ariz. 2018) (quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99,

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[15] A similar doctrine of contract law provides that a party's performance is "discharged" if performance "is made impracticable without his fault." Restatement (Second) of Contracts §261 (1981).

100 (N.Y. 1928)). Even more recently the Delaware Supreme Court held:

> [I]n take-home asbestos exposure cases, manufacturers face no impractical burden to put out area-wide warnings in communities where they have sold products, to get employee lists for household launderers, or to target local dry cleaners or commercial launderers. We agree with the Manufacturers that imposing such a broad duty to warn would be impractical, inefficient, and unfair.

Ramsey v. Ga. S. Univ. Advanced Dev. Ctr., ___ A.3d ___, 2018 WL 3134525, at *18 (Del. June 27, 2018). Warning duties may not "impose an extraordinarily onerous and unworkable burden." *In re Certified Question*, 740 N.W.2d 206, 217 (Mich. 2007). "To impose a duty that either cannot feasibly be implemented or, even if implemented, would have no practical effect would be poor public policy indeed." *Ga. Pac., LLC v. Farrar*, 69 A.3d 1028, 1039 (Md. 2013). "[W]e think it unreasonable to impose a duty . . . to warn all individuals" who are "family members or simply members of the public who were exposed to asbestos-laden clothing, as the mechanism and scope of such warnings would be endless." *Certainteed Corp. v. Fletcher*, 794 S.E.2d 641, 645 (Ga. 2016).

Outside of asbestos litigation, manufacturers and sellers of mind-affecting drugs do not owe duties to anyone injured by such drugs' users who chose to drive under their influence. To impose a duty to warn "an anonymous member of the driving public" who was

"not a known or identifiable third party" is excessive. *Sanchez v. Wal-Mart Stores, Inc.*, 221 P.3d 1276, 1281 (Nev. 2009). To hold that a defendant "owed a legal duty 'under those circumstances would create a zone of risk [that] would be impossible to define.'" *Id.* (quoting *Dent v. Dennis Pharmacy, Inc.*, 924 So.2d 927 (Fla. App. 2006)).

Similarly, *Walton v. Avco Corp.*, 610 A.2d 454 (Pa. 1992), tightly confined liability for post-sale duty to warn to ensure its practicability. *Walton* excluded from that duty "mass-produced" or other "objects that could get swept away in the currents of commerce, becoming impossible to track or difficult to locate." *Id.* at 459. Post-sale duties to warn are limited to potential recipients who "can be identified" and to warnings that "can be effectively communicated." Restatement (Third) of Torts, Products Liability §10(2-3) (1998).

In other analogous situations, courts have likewise resisted the creation of duties that are impossible to satisfy. The Texas Supreme Court refused to impose on landowners a duty to warn an amorphous audience of workers for multiple "independent" employers:

> [T]here are a number of independent contractors, each employing scores of workmen. The identities of some of the workmen will change from day to day. To impose the duty on the [landowner] to know and to warn every workman on the project of a dangerous

> condition would subject him to an impossible burden.

Delhi-Taylor Oil Corp. v. Henry, 416 S.W.2d 390, 394 (Tex. 1967).

Similarly, in nuisance law, "when the nuisance cannot physically be removed, it is unfair to impose a continuing, impossible to fulfill duty to remove the nuisance." *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 675 A.2d 1077, 1086 (N.J. 1996). In a negligence per se case, reading a statute "to create a legally enforceable duty . . . to protect all children from child abuse" was rejected because "[s]uch a duty would be impossible to perform." *Owens v. Garfield*, 784 P.2d 1187, 1191 (Utah 1989). *See Oddo v. Queens Vill. Comm. for Mental Health*, 71 N.E.3d 946, 949 (N.Y. 2017) (no liability for injuries caused by persons after discharge from defendant's care; "it is difficult, if not impossible, to determine when [such a duty] would end"); *Rhodes v. Ill. Cent. Gulf R.R.*, 665 N.E.2d 1260, 1271 (Ill. 1996) ("the impracticality of imposing a legal duty to rescue between parties who stand in no special relationship to each other would leave us hesitant to do so").

Because respondents' postulated duty to warn would run from a large number of defendants to an unlimited number of persons unknown to those defendants, and for an unlimited amount of time, that duty is effectively incapable of performance. Rather, respondents are inviting the Court to impose absolute liability for asbestos exposure upon manufacturers that, on the undisputed record, did not even make any product that

exposed respondents' decedents to asbestos. Absolute liability, via an impossible duty, is not a recognized basis for product liability; therefore, respondents' arguments to recognize such liability in maritime law are not well-taken.

CONCLUSION

"[I]n the realm of domestic law . . . this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1402 (2018) (citations and quotation marks omitted). While the seemingly never-ending saga of asbestos litigation continues to "def[y] customary judicial administration and calls for national legislation," *Ortiz*, 527 U.S. at 821, the Court need not become complicit in its perpetuation. Thus, the Court should not recognize, in the maritime context, a radical expansion of product liability largely unknown to the common law.

For the foregoing reasons, the decision of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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